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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re ISAIAH K., a Person Coming Under
the Juvenile Court Law.

SAN DIEGO COUNTY HEALTH AND
HUMAN SERVICES AGENCY,

Plaintiff and Respondent,

v.

FELICIA K.,

Defendant and Appellant.

D043910

(Super. Ct. No. J514434)

APPEAL from a judgment of the Superior Court of San Diego County, Hideo
Chino, Referee. Affirmed.

Felicia K. appeals a judgment terminating her parental rights to her minor son Isaiah K. under Welfare and Institutions Code¹ section 366.26. Felicia contends the court prejudicially erred by failing to appoint a guardian ad litem for her because she was incompetent to participate in the dependency proceedings. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

In April 2002, the San Diego County Health and Human Services Agency (Agency) filed a petition in the juvenile court on behalf of six-day-old Isaiah alleging his mother Felicia could not provide regular care for him because she was mentally ill. The social worker reported Felicia gave birth to Isaiah alone in her apartment and was taken to the hospital the next day. While in the hospital, Felicia displayed bizarre and disturbing behavior. The social worker noted Felicia was barely able to care for herself and could not provide a safe environment for Isaiah. The court detained Isaiah out of home.

Felicia did not access any services offered by Agency, including transportation, visitation, parenting referrals, counseling and medication evaluation. She refused to cooperate or communicate with the social worker.

Felicia had notice of the jurisdiction and disposition hearings. Although she did not personally appear, she was represented by counsel. The court declared Isaiah a dependent and removed him from parental custody. The court ordered Felicia to comply with the provisions of her case plan, including psychotropic medication evaluation and

¹ Statutory references are to the Welfare and Institutions Code unless otherwise

monitoring, general counseling, therapeutic day treatment services, psychiatric evaluation and parenting education.

Agency initially placed Isaiah with his maternal grandmother but later removed him from that placement because he had two fractured ribs and a hairline skull fracture. The court sustained the allegations of a section 387 supplemental petition and placed Isaiah in licensed foster care. Felicia was in a psychiatric hospital at the time of the hearing, but was represented by counsel.

The social worker reported Felicia's hospitalization prevented her from participating in her case plan. Felicia believed she was emotionally stable enough to care for Isaiah. However, Felicia's conservator² and her treating physician recommended she not have visits with Isaiah.

Kenneth Campos, M.D., interviewed Felicia during her hospitalization and found she was alert and oriented. Her speech was reasonably well organized, she maintained good eye contact and was pleasant throughout the interview. However, she had no insight into her illness and refused to voluntarily cooperate with treatment. When she did not take her medication, she became psychotic with paranoid delusions and had little impulse control.

specified.

² Felicia had a conservator through the Community Research Foundation's REACH program, which provides integrated services to high-risk mentally ill individuals in San Diego's downtown area. Two other conservators were later appointed, presumably to ensure Felicia's basic needs were met and that she received appropriate mental health treatment.

Felicia was transferred to a psychiatric care recovery facility where she was treated for bipolar affective disorder, manic type. Richard Fowler, M.D., reported she was doing well there, cooperating with the program and taking her medication. Felicia's stated goal was to reunify with Isaiah and Dr. Fowler believed Felicia's mental illness was not an impediment to this goal as long as she complied with her treatment.

At a six-month review hearing, the court found Felicia had not made substantive progress with the provisions of her case plan, but ordered six more months of services. The court continued Isaiah's placement in foster care and ordered supervised visitation for Felicia in a structured setting at Agency's discretion.

According to a status review report, Felicia was living in a residential home where most of her basic needs were met. She did not follow through with her case plan, which included therapy, psychotropic medication and parenting classes, but she did submit to a psychological evaluation. The evaluator, Francisco Gomez, Jr., Ph.D., concluded Felicia's psychiatric symptoms severely impaired her ability to care for Isaiah, and her parenting skills would always be marginal. Dr. Gomez recommended supervised visitation begin only after Felicia followed through with medication and provided evidence of psychiatric stability. The next month, Felicia's psychiatrist reported she stopped taking her medication because she believed she was doing well and no longer needed it. Although Felicia requested and received a referral for therapy, she did not appear for her scheduled appointment.

At a contested 12-month hearing, Felicia was not present but was represented by counsel. Felicia's conservator was also present. The court found it was not reasonably

probable Isaiah could be returned to Felicia by the next hearing date. The court terminated services, continued Isaiah's foster placement and set a section 366.26 selection and implementation hearing.

In an assessment report, social worker David Smith recommended the court terminate Felicia's parental rights. Smith reported Isaiah's caregiver wanted to adopt Isaiah and adoption was in his best interests.

Felicia was present with counsel at the contested selection and implementation hearing. Smith testified Felicia was in and out of the hospital during the dependency proceedings. He did not personally meet with Felicia but communicated with her by telephone. During one conversation, Felicia made some disturbing comments, which caused Smith to conclude visitation was not in Isaiah's best interests.

Felicia testified she knew the court proceedings were about Isaiah and understood Agency recommended he be freed for adoption. Felicia did not agree with the recommendation and wanted Isaiah with her. She loved him and missed him. She further testified she was hospitalized for the first six months of the proceedings and did not get services. Her mail was lost and it took several months to contact the social worker. Nobody contacted her so she did not know what she was required to do. Felicia stated she had a house in which she and Isaiah could live, a good support system, she intended to get a job and she was very determined and willing to do whatever was required to regain custody of Isaiah.

After Felicia testified, her counsel made an oral request for modification under section 388 based on changed circumstances, seeking to set aside the selection and

implementation hearing and reinstate services. The court denied the request, although it acknowledged Felicia's circumstances were "changing." After considering the evidence and hearing argument of counsel, the court found by clear and convincing evidence Isaiah was adoptable and none of the exceptions of section 366.26, subdivision (c)(1) applied to make terminating parental rights detrimental to Isaiah. The court terminated Felicia's parental rights and referred Isaiah for adoptive placement.

DISCUSSION

Felicia contends the court had a sua sponte duty to appoint a guardian ad litem for her as required by Code of Civil Procedure sections 372 and 373 because her incompetence was well documented and uncontroverted. She asserts her inability to participate in protecting her rights to Isaiah and the corresponding failure of the court to appoint a guardian ad litem deprived her of due process.

A

When an incompetent person is a party to a proceeding, "that person shall appear either by a guardian or conservator . . . or by a guardian ad litem appointed by the court in which the action . . . is pending." (Code Civ. Proc., § 372.) A guardian ad litem may be appointed on application of a relative or friend of the incompetent person, or of any other party to the proceeding, or by the court on its own motion. (Code Civ. Proc., § 373.) In the context of dependency proceedings, the court may exercise its authority under Code of Civil Procedure section 373 to appoint a guardian ad litem for a parent if it has sufficient information that the parent is incompetent. (*In re Sara D.* (2001) 87 Cal.App.4th 661, 672.) The standard for determining incompetence is whether the parent

has the capacity to understand the nature and consequences of the proceeding and is able to assist counsel in preparing the case so as to protect the parent's interests. (*In re Christina B.* (1993) 19 Cal.App.4th 1441, 1450, citing Penal Code section 1367; *In re Daniel S.* (2004) 115 Cal.App.4th 903, 913.)

B

At the time of the selection and implementation hearing, there was no evidence Felicia's "abilities were so limited that she was effectively rendered incompetent to understand the nature of the proceedings or to assist her counsel in representing her interests so as to require appointment of a guardian ad litem." (*In re R.S.* (1985) 167 Cal.App.3d 946, 980.)³ Rather, the record shows Felicia was able to participate meaningfully in the proceedings and to assist counsel in the conduct of the case. (See *In re Christina B.*, *supra*, 19 Cal.App.4th at p. 1451.) She understood and articulated the reason for the hearing and her testimony was coherent, responsive and focused. Indeed, Felicia's testimony that she had achieved stability in her life, had appropriate housing and a support system allowed counsel to argue for further reunification services on Felicia's behalf under section 388.

Although Agency's reports discussed Felicia's mental illness and inability to parent Isaiah, they did not suggest she was incompetent to participate in the legal proceedings.

³ Felicia may only challenge the court's failure to appoint a guardian ad litem at the selection and implementation hearing from which she now appeals. The absence of a guardian ad litem at any earlier hearings cannot be raised because orders from those hearings are final and res judicata. (*In re Matthew C.* (1993) 6 Cal.4th 386, 393; *In re Lisa M.* (1986) 177 Cal.App.3d 915, 919-920.)

Felicia clearly articulated a goal to reunify with her son, asked for and received referrals for services and objected to a plan of adoption for Isaiah. Counsel for Felicia raised no concerns about Felicia's ability to understand the nature of the proceedings in which Agency sought to terminate her parental rights or her ability to cooperate in preparing the case and protecting her interests. Consistent with Felicia's position, counsel acted as a diligent advocate by presenting evidence on her behalf, seeking more services for her and arguing against termination of her parental rights. Thus, the information before the court at the contested hearing did not trigger a duty to inquire into Felicia's competence or to appoint a guardian ad litem. (See *In re Ronnell A.* (1996) 44 Cal.App.4th 1352, 1367 [court did not err by failing to appoint guardian ad litem for father where it knew of father's chronic mental illness but where father understood nature of proceedings, participated meaningfully and cooperated with his counsel].)

C

The absence of a guardian ad litem did not implicate Felicia's due process rights. As we already concluded, Felicia was able to meaningfully participate in protecting her relationship with Isaiah, despite her mental illness. She received notice of every hearing, was represented by counsel throughout the proceedings, and personally appeared and testified at the selection and implementation hearing to contest the termination of her parental rights.

Moreover, there is no reasonable probability the outcome would have been different had the court appointed a guardian ad litem. (*In re Celine R.* (2003) 31 Cal.4th 45, 60.) As Felicia acknowledges, the court's ability to appoint a guardian ad litem exists

to protect an incompetent parent, particularly from the unwillingness or inability to cooperate in asserting or preserving parental rights. Here, Felicia cooperated with her attorney in an attempt to assert and maintain her parental rights. "A guardian could not have made a more gallant effort on [Felicia's] behalf. No prejudice has been shown." (*In re Ronnell A.*, *supra*, 44 Cal.App.3d at p. 1368.)

DISPOSITION

The judgment is affirmed.

HALLER, Acting P.J.

WE CONCUR:

McDONALD, J.

IRION, J.